United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1615.

ANNIE E. SCOTT

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT.

Statement of the Case.

The judgment appealed from was rendered upon a verdict which the court below directed the jury to return in an action for negligence. The plaintiff sued the District of Columbia for injuries received on April 13, 1901, in the following manner:

On that day the plaintiff, who resided in Baltimore but was employed in Washington, arrived at the Pennsylvania Station, Sixth and B streets northwest, at about a quarter before nine o'clock. Her destination was Kann's store, Eighth street and Market space. She came out of the ladies' waiting room at B street, and, together with an acquaintance (the witness, F. Gertrude Elliott), went down the south side of B street to Seventh street, and crossed diagonally to the market corner. She reached the curb and proceeded to step upon the sidewalk, but as she stepped her forward foot slid along the top of an iron sewer plate in the sidewalk, and her other foot went from under her. She tried to catch her companion, but

her balance was too far gone to be recovered, and she consequently fell with force back into the street (Rec. p. 11).

From her fall the plaintiff received serious and permanent injuries (Rec. p. 15); suffered great pain, and, although given drastic treatment, was confined to her house until the end of the following June (Rec. p. 12).

The cause of the plaintiff's foot sliding from under her was that the plate in the sidewalk upon which she stepped was both worn and out of alignment. It was a plate of sheet iron which had originally been corrugated—the corrugation being, of course, for the purpose of preventing the iron surface from being a less secure footing than the rest of the pavement. But it had been permitted to become worn smooth (Rec. p. 14). In the language of one witness, "it was worn smooth and bright." When rubbed with the foot "it would brighten up right away" (L. P. Siebold, Rec. p. 13). Instead of being in place with the rest of the sidewalk, "it was on an incline toward the building line from the curb down" (Rec. p. 13). It was depressed as it ran back from the edge of the sidewalk three-quarters of an inch, which, if we consider the width of such a plate, is a marked incline.

It appears beyond discussion, therefore, from the testimony, that when the plaintiff stepped upon the sidewalk her forward foot found no support in the smooth, slippery surface, and simply went out from under her, thereby throwing her from off her balance to the ground.

The plaintiff was not the first person to fall at that place. The witness, Matilda Ann Fendall, an old colored woman, who had a flower-stand at the spot, testified that before this she had seen people fall there several times (Rec. p. 13). The plaintiff asked of the witness, L. P. Seibold, who testified as to the condition of the plate about the time of the accident, whether, when he

returned there within ten days or two weeks after, he saw the plate again, but this question was not permitted to be answered (Rec. p. 13).

Assignments of Error.

I. The court erred in directing the jury to return a verdict in favor of the defendant.

II. The court erred in sustaining the objection to the question put to the witness, L. P. Siebold, as to whether, on his second visit, within ten days after the accident, he saw the plate on which the plaintiff slipped.

ARGUMENT.

I.

The primary question in this case was whether a sidewalk in the condition testified to was reasonably safe for public use. Not so much whether it was dangerous, but whether it was *reasonably safe*, for that is the measure of the defendant's duty.

Anderson v. *City of Albion*, 89 N. W. Rep. 794, 795.

District of Columbia v. *Woodbury*, 136 U. S. 450, 463.

The learned Justice, in taking the case from the jury, decided point blank that, notwithstanding its slippery surface and its inclined position, the sidewalk was reasonably safe. In so doing he simply assumed the right to decide a question of fact. For whether a sidewalk in which are defects is reasonably safe for foot passengers is essentially a question of fact, and, as such, for the jury.

District of Columbia v. *Baswell*, 6 App. 402, 417.

Corts v. *District of Columbia*, 18 D. C. 277, 294.

Congdon v. *Norwich*, 37 Conn. 414, 418.

And the question whether an **iron plate of this character, permitted to become worn and smooth in the precise manner testified to in this case,** is a reasonably safe footing for people compelled to walk upon it, has been expressly held to be a question of fact for the jury and not a question of law for the Court.

Cromarty v. *Boston*, 127 Mass. 329, 331; 34 Am. Rep. 381.

Roe v. *City of New York*, 54 N. Y. Sup. Ct. 298; N. Y. Supp. 447.

The learned Justice, sitting as a juryman, might have thought that a sidewalk having a surface of this character in it was reasonably safe, but there is no rule which would enable him to determine that in advance as a matter of law.

The key to his action in taking this case from the jury can be found only in a misconception of the doctrine as to directing verdicts. Because he would have felt at liberty to set aside a verdict for the plaintiff as one against the preponderance of evidence, he believed he had the right peremptorily to direct a verdict in advance to the contrary. This was his professed reason, and, although his opinion in this case was not written, his settled view on that subject is shown by the following extract from an opinion written by him in another case:

> "And if the case had been submitted to the jury and a verdict had been rendered in favor of the plaintiff, it seems clear to my mind that it would have been the duty of the court to set it aside as being contrary to the evidence or against the weight of the evidence.
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> "When such facts appear to the trial court, it would seem to be unnecessary to submit the question to the jury; and as I understand the decision of the Supreme Court, and particularly the case of *Patton* v. *Texas & Pacific Railway Company*, 179 U. S. 658, it is the duty of the trial

> court, under such circumstance, to direct a verdict in accordance with the views entertained by the court."
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> *Am. Sav. Bank* v. *Roome*, at Law, No. 47,376.

This confusion of the plain distinction between the right to set aside a verdict and again remit a case to the jury on the one hand, and on the other hand the duty to direct a verdict in advance, when, as a matter of law, the plaintiff fails to make out a case, has been so often condemned by this court that it is sufficient merely to refer to the authorities.

> *Warthen* v. *Hammond*, 5 App. 167, 173.
> *Adams* v. *Railroad Co.*, 9 App. 26, 30, 32.
> *B. & O. R. R.* v. *Landrigan*, 20 App. 135, 165.

The true rule as to taking cases from the jury in actions for negligence has been repeatedly laid down by the Supreme Court of the United States, and by this court in unmistakable terms:

> "It is only where the facts are such that all reasonable men *must draw the same conclusion* from them that the question of negligence is ever considered as one of law for the court."
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> *Grand Trunk R. R.* v. *Ives*, 144 U. S. 408, 417.
> *T. & P. R. R. Co.* v. *Gentry*, 163 U. S. 353, 366.
> *Railroad Co.* v. *Landrigan*, 20 App. 135, 165.
> *District of Columbia* v. *Payne*, 13 App. D. C. 500, 505.
> *Ward* v. *District of Columbia*, 24 App. D. C. 524, 529.
> *Mosheuval* v. *District of Columbia*, 191 U. S. 247, 252.

Are the facts in evidence in this case such that no reasonable man could draw the conclusion that this sidewalk was not reasonably safe for public use? The

plate lay in the direct line of public travel. The spot was one of the most frequented in the city. In that highway the defendant had placed a metallic surface different in all respects from the usual surface of highways. Realizing from its knowledge of the physical properties of that metallic surface that it would necessarily be a pitfall, it proceeded at the beginning to render it reasonably safe by altering its character, and artificially roughening it. It left that metallic surface in a highway subject to the heaviest sort of travel until it had become a smooth polished surface, and permitted it, in addition, to become inclined at such an angle that when one stepped upon it from the street, the tendency to slip caused by the surface itself would be accelerated by the force of gravity. It might, indeed, be difficult to find any half dozen reasonable persons who would contend that a sidewalk in that condition was reasonably safe. But it is surely absurd to say that no reasonable man could draw the conclusion that it was not. At any rate, that it was reasonably safe can not be determined in advance by any known rule of law.

Cromarty v. *Boston*, 127 Mass. 329, 331.

Something may, perhaps, be said by counsel for the defendant about the testimony that the day was moist and damp, and the possibility that the plaintiff might have fallen because the plate was slippery from moisture; but there is no evidence to support this possibility. In the first place, the testimony is clear that it was not raining at the time. The most that appears is that it was a "gloomy day, with a gloomy, moist atmosphere." There is no evidence of any cause from which the plaintiff could have fallen except the positive testimony as to the worn condition of the plate and its inclined position. Moreover, the District of Columbia is bound to provide sidewalks reasonably safe under all conditions of

weather, and if the sidewalk, although wet with rain, would have been reasonably safe *except* for this patch of smoothened surface, then the smoothened surface and not the wet is the proximate cause of the plaintiff's injury. At all events it is "for the jury to say whether she slipped because of the wet only, or from the smoothness of the covering with the wet on it."

Roe v. *Mayor, etc.*, 56 N. Y. Sup. Ct. 306, 307.
Hayes v. *Hyde Park*, 153 Mass. 514, 516.
District of Columbia v. *Frazer*, 21 App. 154, 159.

The court below took this case from the jury because he did not regard the condition of the plate as a defect, laying no stress upon the question of notice of the defect, but inasmuch as it is an element in the case, it would be improper to pass it over. It is well settled that it is sufficient if there be facts and circumstances from which the jury could rationally conclude that the defendant, its officers or agents, would have been notified of the defective condition if they had exercised reasonable care and diligence in inspecting and examining the sidewalk with a view to keeping it in repair and in a state of safety to passengers.

District of Columbia v. *Payne*, 13 App. D. C. 500, 503.
Freeholders v. *Hough*, 55 N. J. L. 628, 642.

This duty to inspect, and the constructive notice which is a consequence of it, are clearly dependent upon and commensurate with the extent and amount of travel.

Olsen v. *Worcester*, 142 Mass. 536, 537.
Fritsch v. *Allegheny*, 91 Pa. St. 226.
Woodbury v. *District of Columbia*, 5 Mackey, 127, 138.

The court will take notice of the fact that the sidewalk at the market corner at Seventh and B streets is, perhaps, the most traveled way in the whole District of Columbia.

When the defendant put an iron plate in that frequented corner it was chargeable with knowledge of the natural qualities and tendency of the material used.

Sherwood v. *D. C.*, 3 Mackey, 276, 280.
Denver v. *Dean*, 10 Colo. 375, 378.
Joliet v. *McCraney*, 49 Ill. App. 381, 383.
Indianapolis v. *Scott*, 72 Ind. 196, 200.

The evidence as to the physical condition of the plate, even apart from the testimony as to previous accidents in the same spot, shows that inspection within a week or even within a month of the plaintiff's fall would have disclosed its dangerous character. There was no evidence that there had been any inspection of this plate at any time. How then can it be said as matter of law that the plaintiff could not have had notice of it by reasonable diligence? Is it for the court to say that no inspection of iron plates in traveled ways, or inspection which is not oftener than once a month, is a compliance with the duty of constant and active vigilance which rests upon the municipality? On the contrary, it is preeminently for the jury to say what would constitute reasonable diligence in such a case, for there is no rule of law as to the time necessary to impute notice.

Carrington v. *St. Louis*, 89 Mo. 208, 212, 213.
Fortin v. *Easthampton*, 145 Mass. 196, 198.
D. C. v. *Woodbury*, 136 U. S. 450, 463.
Jennison v. *Atchison*, 16 Kans. 358.
Butcher v. *Philadelphia*, 202 Pa. St. 1, 6.
D. C. v. *Payne*, 13 App. D. C. 500, 505.
Parsons v. *Manchester*, 67 N. H. 163, 164.

In truth, the *Payne* case rules the case at bar. In that case there was not, as here, evidence of prior accidents. The case rested solely on evidence of certain physical circumstances, from which one might rationally infer the continued existence of the break in the lug. The court was dealing with one of these very sewer plates:

> "It is very manifest that from the nature and location of the structure in the sidewalk it was dangerous to passengers unless kept in good repair, and to keep it in repair and safe condition frequent and careful inspection was required. . . .
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> "In this case, it is true, the evidence is not strong as bearing upon the essential fact of notice. It consisted entirely of circumstances from which notice was sought to be implied, and the principal circumstance was the length of time that the lid or cover of the catch basin had remained in its broken condition before the accident, as indicated by the rust and dirt accumulated on the broken surface of the lug attached to the cover of the basin. No person was produced as a witness who had ever observed, before the accident, the broken condition of the cover of the basin. But that is far from being conclusive that the break did not exist for a considerable time before the accident occurred. At any rate, there were facts and circumstances in proof in respect of the question of constructive or implied notice to the municipal authorities, and the consequent negligence of those authorities in failing to keep in safe repair the lid or cover of the catch basin, from which reasonable men might fairly differ upon the question as to whether the accident was occasioned by the negligence of the municipal authorities or not; and in such case the court can not assume the right to decide the question and withdraw the case from the jury. The question falls within the province of the jury to decide, and it would have been error, on the circumstances of this case, if the court had taken the case from the jury. *Grand Trunk R. R. Co.* v.

> *Ives*, 144 U. S. 408. As was said by the court in the case just referred to: 'It is only where the facts are such that all reasonable men *must draw* the same conclusion from them that the question of negligence is ever considered as one of law for the court.'"
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> *D. C.* v. *Payne, ubi supra.*

That it was for the jury to determine from the clear physical circumstances and the evidence of prior accidents (*Armes* v. *D. C.*, 107 U. S., p. 525) whether this duty of frequent inspection, if complied with, would have apprised the defendant of the condition of the sewer plate is abundantly shown by the case of—

Market Company v. *Clagett*, 19 App. 12, 26.

There plaintiff, having slipped in the market, about 1 o'clock, upon a pile of fish, which had been there but fifteen minutes, was permitted to recover, although there was proof that there had been inspection or patrol of the fish aisle about 9 o'clock in the morning. It was left to the jury to determine what would have been ordinary care and diligence in maintaining inspection under the circumstances.

Ibid, pp. 22, 23, 26, 27.

Having the means of knowledge and negligently remaining ignorant is equivalent, in creating a liability, to actual knowledge. Any sort of inspection would necessarily have disclosed the unsafe condition of this plate. It was for the jury to say whether, having that means of knowledge at its command, it was negligent for the District to leave it there until after the plaintiff had received serious injuries.

On the whole case it may at least be said, in the language of this court, that reasonable men might fairly differ as to whether the accident was occasioned by the negligence of the municipal authorities or not. And that is enough for our purpose.

II.

The plaintiffs proved the physical and mechanical condition of the plate about the time of the accident. One of the witnésses testifying to this, further testified that he visited the place again within ten days or two weeks. He was asked whether he again saw the plate. To this the defendant objected upon the ground that the answer elicited was intended to show that the plate had been removed by the authorities after the accident. Conceding the full force of the rule against testimony of precautions against future accidents announced in *Columbia Ry. Co.* v. *Hawthorne*, 144 U. S. 206, we respectfully submit, nevertheless, that this testimony was prima facie admissible.

In the first place, the plaintiff had a right to show that she had fairly exhausted her facilities for giving the jury a detailed description of the plate, with measurements if necessary, and, secondly, because evidence of the removal of the plate would not have constituted evidence of future precautions. This was not evidence of *change or alteration*. It was not evidence of "additional safeguards" or a "new plan." It would have shown merely that the District had removed something which it had no reason or ground for removing unless it had become defective and improper for the purpose for which it had been put down.

It is respectfully submitted that the judgment appealed from should be reversed.

HENRY H. GLASSIE,
MYER COHEN.